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Commentary

Ecosystem Restoration: The New New Thing

Richard A. Duncan[†]

INTRODUCTION

An environmental law focused on ecosystems as the primary frame of reference, and ecosystem restoration or preservation as the ultimate goal, is an as-yet unrealized hope in American law. The desire for such a reorientation of environmental law is born of the inability of the landmark environmental statutes of the 1960s and 1970s to comprehensively halt and reverse tangible environmental decline—acid rain, agricultural run-off of such severity as to create huge “dead zones” in our seas, and progressive loss of wetlands and old growth forests.¹ The laws of the 1960s and 1970s have helped; without them the ecological ills identified by, for instance, Aldo Leopold in the 1940s would certainly be worse under the more crowded, developed conditions of today. The papers presented by Amy Wildermuth and Professor Dan Tarlock remind us of the roots of the land-health ethic that informs the idea of ecosystem restoration, as well as the many practical obstacles to realizing an ecosystem-based

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1. I refer to the following statutes: Wilderness Act, 16 U.S.C. §§ 1131-1136 (2000); Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2000); Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1251-1387 (2000); National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4331-4370f (2000); Clean Air Act, 42 U.S.C. §§ 7401-7671q.

environmental law.²

I. THE DEPLETED STATE OF OUR PRESENT INTELLECTUAL CAPITAL

In her essay, Amy Wildermuth posits a thought experiment to illustrate a Leopoldian approach to watershed restoration, demonstrating a reasoned preference on the basis of a land health ethic for the use of wetland stream buffers to filter agricultural runoff as opposed to mini-sewage treatment plants assumed to be equally efficacious at waste removal.³ The choice, however, may not be between wetland buffers or mini-treatment plants. We seem perennially to get neither, as is shown in the “extremely threatened” water quality of streams in Minnesota such as the Minnesota River.⁴

The Clean Water Act (CWA) has not successfully addressed nonpoint source pollution.⁵ One provision of that Act that could address nonpoint source pollution such as agricultural runoff is section 303(d), which requires establishment of total maximum daily loads (TMDLs) of various pollutants to streams, and in theory mandates regulation of nonpoint polluters to confine total pollutants to within the parameters set by the TMDLs.⁶ State water pollution control agencies were to have established such TMDLs by 1979.⁷ By the 1990s, the failure of states to establish and monitor compliance with TMDLs had left this provision of the CWA largely unimplemented.⁸ Litigation to compel agency action—such as a federal takeover of state responsibilities—in the face of delinquent state agency action has had only mixed success.⁹

2. See A. Dan Tarlock, *Slouching Toward Eden: The Eco-pragmatic Challenges of Ecosystem Revival*, 87 MINN. L. REV. 1173, 1184-85 (2003); Amy J. Wildermuth, *Eco-pragmatism and Ecology: What's Leopold Got to Do with It?*, 87 MINN. L. REV. 1145, 1152-54 (2003).

3. Wildermuth, *supra* note 2, at 1162-63.

4. This information arises out of a personal communication on February 22, 2003, between the author and Paul Hansen, Executive Director, Izaak Walton League of America, Inc., Gaithersburg, MD.

5. See e.g., *Kingman Park Civic Ass'n v. EPA*, 84 F. Supp 2d. 1, 4 (D.D.C. 1999) (noting the increased pollution of District of Columbia's waters from nonpoint sources since the passage of the CWA).

6. See 33 U.S.C. § 1313(d).

7. *Kingman Park*, 84 F. Supp 2d. at 3 (citing *Env'tl. Defense Fund, Inc. v. Costle*, 657 F.2d 275, 295 (D.C. Cir. 1981)).

8. *Id.* at 5 (collecting cases).

9. See *Sierra Club v. Browner*, 843 F. Supp. 1304, 1312 (D. Minn. 1993) (refusing to order federal takeover of Minnesota's TMDL program). Of 5 U.S.C.

As the experience of TMDL regulation under the CWA shows, the current "intellectual capital" of environmental law has proven largely incapable of handling watershed-wide, nonpoint source pollution. Certainly from the point of view of ecosystem restoration, current law has not succeeded.

II. THE PROMISE AND PERIL OF ECOSYSTEM-BASED ENVIRONMENTAL INITIATIVES

Can ecosystem-based law get us out of this holding pattern? The land-health ethic developed by Aldo Leopold is aspirational, and privately based. To convert it into public policy is the challenge to those who advocate an explicit legal focus on ecosystem restoration.

The ecosystem-based legal initiatives of the 1990s relied almost entirely on the goodwill of the administrative state to implement them.¹⁰ Such efforts are fatally subject to the defects in agency culture identified by Tarlock. These programs incorporate a façade of stakeholder input, typically through a lengthy solicitation of public comment in connection with drafting an environmental impact statement (EIS) pursuant to the National Environmental Protection Act (NEPA).¹¹ They

§ 706(1), the provision in the Administrative Procedure Act that directs courts to compel agency action unreasonably delayed or denied, Professor Davis once titled a section in his treatise, *The Courts Consistently Ignore and Violate a Provision of the APA That Is Both Clear and Valid*. 4 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 23:9 (2d ed. 1983).

10. Examples include federal initiatives during the Clinton administration to restore natural waterflows to the Everglades, and to restore natural apex predators to the northern Rocky Mountain states. See e.g., Comprehensive Everglades Restoration Plan, Pub. L. No. 106-541, 114 Stat. 2572 (2000). The administration successfully reintroduced wolves to Yellowstone National Park and designated wilderness areas in central Idaho under the Endangered Species Act. See *Wyo. Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1241 (10th Cir. 2000) (upholding wolf reintroduction against a variety of legal challenges). This success came, however, at the cost of adopting regulations that left wolves largely at risk outside of designated "recovery zones." See *Endangered and Threatened Wildlife and Plants*, 50 C.F.R. §17.84 (2001) (wolf reintroduction rule). A similar effort to reintroduce grizzly bears into areas of the northern Rockies from which they have been extirpated has been shelved by the Bush administration. Fish and Wildlife Service, 66 Fed. Reg. 33620 (proposed June 22, 2001) (to be codified at 50 C.F.R. p. 17) (recommending selection of a "no action" alternative on grizzly bear reintroduction).

11. Too often, this process leads to a bloated EIS that is of little use as a decision-making tool. The EIS for the Yellowstone wolf reintroduction program, for instance, attracted over 160,000 comments! *Wyo. Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224 (10th Cir. 2000) (unpublished administrative record) (on file with author). Conversely, because agency officials fail to

ultimately enshrine, however, the final bureaucratic weighing of human and environmental interests found in 1960s-era resource management statutes such as the Multiple-Use Sustained-Yield Act of 1960.¹²

Ecosystem-based program initiatives are not presently susceptible to effective judicial review. At least since the early 1990s, with the Supreme Court's decision in *Lujan v. National Wildlife Federation*,¹³ challenges to ecosystem-wide agency actions have faced a constant threat of dismissal as unmaintainable "programmatic" assaults on government policy. The current Supreme Court's hostility to citizen suit review of agency action is part, but not all, of the story. The current

disclose that NEPA does *not* create a stakeholder-driven decisional process, but rather exists in the usual realm of agency-driven decisional processes, public reaction to such documents often tends toward cynical exasperation, as there is no way to confirm the impact, if any, of stakeholder input on agency decisions. See Katharine Q. Seelye, *Flooded With Comments, Officials Plug Their Ears*, N.Y. TIMES, Nov. 17, 2002, § 4, at 4 (noting that 80% of 360,000 comments received on the Bush administration's proposal for increased snowmobiling in Yellowstone National Park favored banning the machines). Burdening NEPA in this fashion undermines public support for the concept of environmental review, and enables actions such as the Bush administration's present attempted mugging of the NEPA statute through a "reform" task force. See Nat'l Envtl. Policy Act Task Force, 67 Fed. Reg. 45,510 (July 9, 2002); see also Cory Reiss, *Changes to Environmental Laws Likely in GOP Senate*, MORNING STAR (Wilmington, N.C.), Nov. 18, 2002, at 1A, available at LEXIS, News Library, News Group File, All; *Behind the Smokescreen: White House's 'Wildfire' Bill to Weaken Environmental Protection, Public Rights in Federal Land Management Decisions, Analysis Shows*, ASCRIBE NEWSWIRE, Sept. 9, 2002, available at LEXIS, News Library, News Group File, All; *All Things Considered: Environmentalists Claim Bush Administration is Undermining the National Environmental Policy Act* (Nat'l Public Radio broadcast, Oct. 14, 2002), available at LEXIS, News Library, News Group File, All.

12. 16 U.S.C. §§ 528-531 (2000). I am not an absolute proponent of stakeholder-based decisional processes. Having participated directly in such processes involving the Boundary Waters Canoe Area Wilderness and Voyageurs National Park, both in northern Minnesota, and having been an interested observer of a "roundtable" process to develop a Minnesota state wolf management plan, my experience is that such ad hoc processes systematically overrate local preferences, and current legal frameworks provide no assurance to participants that even positive outcomes of stakeholder processes will be enacted. See Richard A. Duncan and Kevin Proescholdt, *Protecting the Boundary Waters Canoe Area Wilderness*, 76 DENVER U. L. REV. 621, 649-51 (1999); see also DOUGLAS S. KENNY, UNIVERSITY OF COLORADO NATURAL RESOURCES LAW CENTER, ARGUING ABOUT CONSENSUS: EXAMINING THE CASE AGAINST WESTERN WATERSHED INITIATIVES AND OTHER COLLABORATIVE GROUPS IN ACTIVE NATURAL RESOURCES MANAGEMENT (2000), available at <http://www.colorado.edu/Law/NRLC/Publications/RR23.pdf> (last visited Mar. 6, 2003).

13. 497 U.S. 871, 898-99 (1990).

battle between South Dakota and its recreationists on the one hand, and barge owners in Missouri on the other, over the Army Corps of Engineers' management of flow rates on the Missouri River demonstrates the possibility of confusing and often directly conflicting judicial decisions in reviewing agency actions on a watershed or larger basis.¹⁴

There is no unified legal construct yet in place to put ecosystem health at the center of administrative decision making. Because the current form of ecosystem-based program initiatives are essentially an administrative overlay to existing environmental statutes,¹⁵ such initiatives are susceptible to essentially unreviewable political and administrative backsliding.

CONCLUSION

We are likely now in a time of quiescence in the development of ecosystem recovery as a goal of American environmental law. The initiatives that have occurred at the federal level were largely the work of former Secretary of the

14. See *State of South Dakota v. Ubbelohde*, Nos. 022187, 022191, 022305 (8th Cir. May 21, 2002) (granting stay of potentially conflicting district court orders regarding the Army Corps of Engineers' management of the Missouri River); see also *Corps Appeals River Rulings*, ABERDEEN AMERICAN NEWS (S.D.), May 19, 2002, available at 2002 WL 19710328; Mark Henckel, *Water Fight*, BILLINGS GAZETTE (Mont.), May 14, 2002, available at 2002 WL 11823340.

15. Some existing environmental statutes can more directly support ecosystem restoration initiatives than others. The Endangered Species Act, for instance, has an ecosystem-restorative cast, particularly in its critical habitat designation provisions. See 16 U.S.C. § 1533. The ESA admittedly has less of a land-health ethic focus than an animal-health ethic focus. That focus served the statute well when it was first passed in 1973, when public concern was intense for North American species such as the bald eagle and gray wolf, as well as various African and Asian fauna far from the designs of any American real estate developer. The animal-specific focus has served the statute less well when the critter at issue is, for instance, the Delhi Sands Flower-Loving Fly. See *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1043-45 (D.C. Cir. 1997), cert. denied, 524 U.S. 937 (1998). In such situations, the public might be more likely to support a land-health ethic approach which protects the health of the ecosystem of which the fly is a part. See also *Endangered Fly Stalls Some California Projects*, N.Y. TIMES, Dec. 1, 2002, at 28.

The Wilderness Act, an explicitly preservationist tool, can have ecosystem restorative effects in large-scale use, such as in Alaskan wilderness areas. The creation of exceptions to the rigorous strictures of wilderness preservation in the name of an expansive use of the statute for ecosystem restorative efforts is not, however, a strategy I would endorse.

Interior Bruce Babbitt.¹⁶ The present administration is unlikely to see much benefit to its programmatic goals of resource development and extraction from ecosystem restoration initiatives.¹⁷

To imbed ecosystem restoration into environmental law will require a fundamental reformation of the statutes governing public land management and regulation of air and water pollutants, to create identifiable standards and criteria for study and decision making, and tools for meaningful judicial review of the substantive outcomes of such administrative processes. This task is staggering and will not be undertaken by the current administration. If attention is not turned to this project by the middle years of this decade, ecosystem restoration risks becoming the NASDAQ of environmental law—the hot new idea of the 1990s, whose overhyped promises of success are followed by a devaluation so sharp as to alienate public support from a project necessary to renew the legal intellectual capital on which our nation's environmental health relies.

16. David J. Hayes, *Land Conservation and Restoration: Moving to the Landscape Level*, 21 VA. ENVTL. L.J. 115, 116 (2002); John D. Leshy, *The Babbitt Legacy at the Department of the Interior: A Preliminary Review*, 31 ENVTL. L. 199, 226 (2001).

17. See Douglas Jehl, *On Environmental Rules, Bush Sees a Balance, Critics a Threat*, N.Y. TIMES, Feb. 23, 2003, at A1.